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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1912.

A. STRAUS,
Appellant,

vs.

W. L. BOXWORTH,
Appellee.

No. 19

APPEAL FROM THE SUPREME COURT OF NEW MEXICO.

BRIEF OF APPELLEE.

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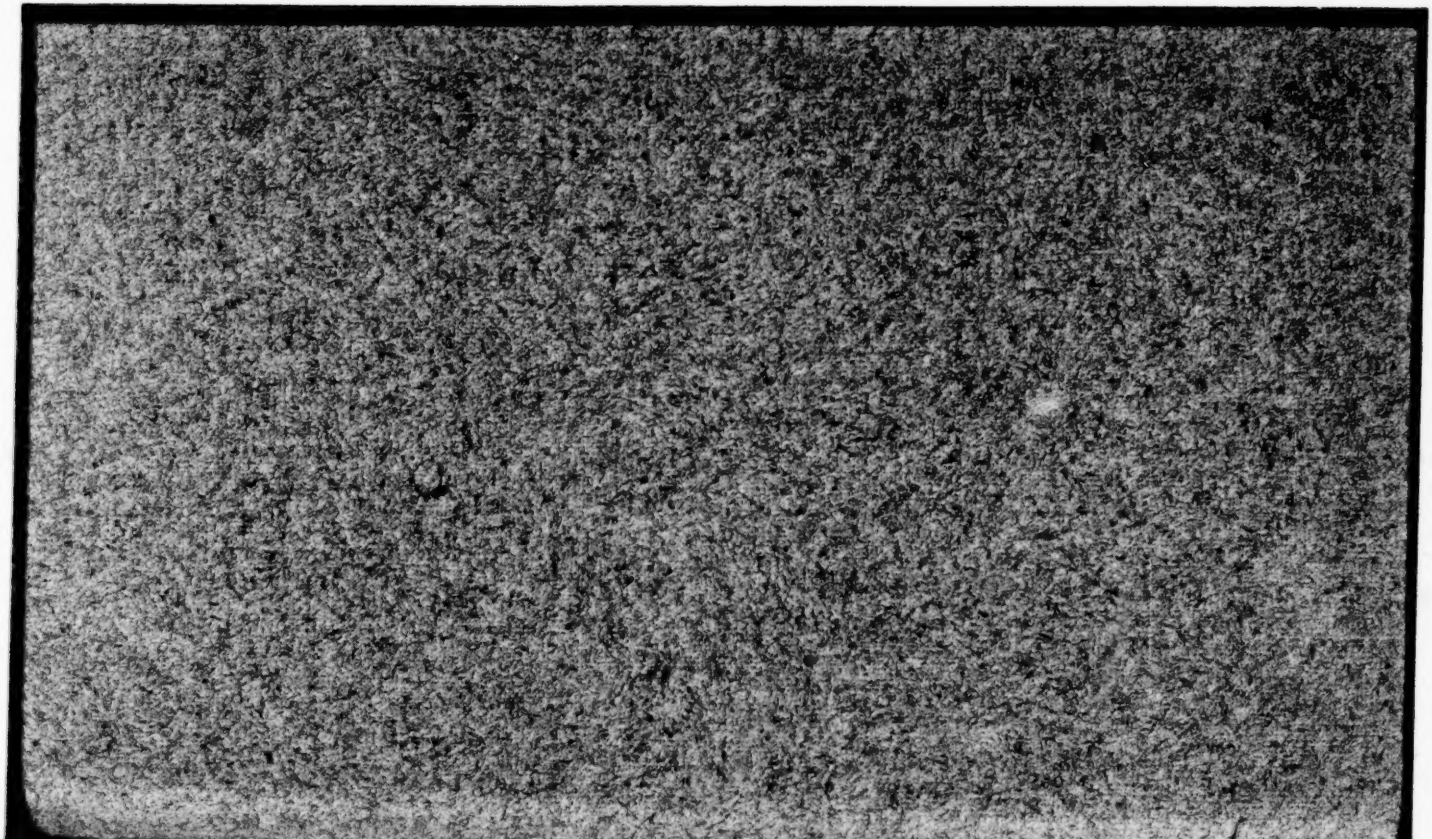

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1912.

A. STRAUS,

Appellant,

vs.

W. L. FOXWORTH,

Appellee.

No. 550.

APPEAL FROM THE SUPREME COURT OF NEW MEXICO.

BRIEF OF APPELLEE.

STATEMENT OF FACTS.

This is an action brought to quiet the title to certain lands wherein it is alleged that the appellant was the owner in fee simple, and that the appellee had made some claim adverse thereto, which was based upon an alleged delinquent tax sale, and the complaint reciting that the tax sale was illegal and void on account of certain irregularities in the tax proceedings, stating:

First: That the land was not sufficiently advertised for sale.

Second: That proof of publication was not made as required by law.

Third: That proof of posting of delinquent tax sale was not made.

Fourth: That the Probate Clerk did not preserve the proof of publication and posting of notice of sale as required by law.

Fifth: That the land was assessed for $3.78, and was sold for $4.02.

The appellee demurred to this complaint, stating that it did not set up any of the grounds permitted by the statutes of New Mexico for the impeachment of tax titles, namely:

(a) That the real estate was not liable to the tax or assessment.

(b) That the tax had been paid at the time of sale.

(c) That the land had been redeemed from tax sale.

The demurrer was sustained, and appellant having elected to stand on the complaint, final judgment of dismissal was entered, from which the appellant appealed to the Supreme Court of New Mexico.

The Supreme Court of New Mexico entered judgment on the appeal, affirming the judgment of the

lower court from which judgment appellant appealed to this court.

Without notice the appellant filed an affidavit in the Supreme Court of New Mexico, attempting to prove that the value of the land involved in the said cause exceeded the value of $5000.00.

The appellee immediately upon learning that such affidavit had been filed, prepared and filed a motion in this cause to limit the scope of the appeal to the first assignment of error of the appellant, which motion is as follows:

"Comes now the appellee, W. L. Foxworth, by his attorney of record herein, Harry H. McElroy, and moves the court to limit the appeal of said appellant herein to the one question raised by appellant in his first ground of error of appellant's assignment of errors filed herein, to-wit:

'That the court erred in holding and deciding that the provisions of Chapter 22 of the Acts of the Legislative Assembly for the Territory of New Mexico for the year 1889, are not in conflict with and in violation of the provisions of the 14th Amendment of the Constitution of the United States, for that the Territory of New Mexico, by and through the provisions of said Chapter 22 assumes and seeks to deprive the appellant and other citizens of the United States of property, without due process of law.'

And appellee aforesaid moves the court that all other questions sought to be raised by said appeal and said assignments of errors, than the one stated, be dismissed and that appellant be denied the review of said assignments of error, and that this appeal be dis-

missed as to all questions of error assigned, excepting the first assignment of error, stated.

And for his grounds for said motion, appellee says, and shows to the court by affidavits attached hereto:

1. That the property involved in this action is not of the value of Five Thousand Dollars, and in fact is not worth to exceed Fifteen Hundred Dollars.

2. That the value of the property involved in this action is not shown in the original record of the appeal to the Supreme Court of New Mexico, and was introduced into the record of this case by the affidavit of the appellant; that the question of value is one of fact upon which appellee ought to be entitled to be heard, and that appellee was given no notice of the filing of said affidavit, nor notice that the issue of value of said property was to be raised, and was given no opportunity to deny the same in the Supreme Court of New Mexico, and had no oportunity of being heard in that court upon this issue, and that the record of this cause does not show service on appellee in the premises.

3. That the affidavit of appellant as to the value of said property is made upon information and belief; does not show grounds of such belief; is indefinite and uncertain; and that the witness does not show himself qualified and no foundation is laid for his testimony as to the value of such property.

4. That appellee files herewith affidavits showing the value of said property and stands ready and willing to prove the value thereof.

5. That, excepting the first assignment of error, the Supreme Court of the United States ought not to take jurisdiction of the issues raised unless the property

involved is of the value of $5000.00, and that the other errors assigned do not raise questions subject to the review of this court.'

and in support of such motion filed the affidavit of Ira J. Briscoe, the assessor of the county in which the land is situated, and the affidavits of eight persons who were familiar with the land and the value thereof, showing that the same did not exceed the value of $1500.00."

The said motion and affidavit supporting the same have been printed and filed in this cause.

The appellant under his statement of facts has attempted to read into the record a number of statements which do not appear on the record, wherein they state that the appellant is the owner of a large cattle ranch covering an area of approximately thirty miles square, about six thousand acres of which was patented land in small tracts, covering natural waters, and by reason thereof, controlling a large area of the public lands as a cattle range, and setting forth that the land was distributed in several counties, etc. This is a pure injection o fcounsel as there is nothing in the pleadings of the case that disclose that any such condition exists, and was doubtless put in for the purpose of influencing the mind of this court as to the value of the subject matter of this controversy.

BRIEF AND ARGUMENT.

On motion to limit the scope of the appeal.

An examination of the motion filed in this case will show that without notice to appellee or any of his attorneys, the appellant filed his affidavit in the Supreme Court of New Mexico, alleging upon information and belief that the land exceeded the value of $5000.

Subsequent thereto and after the filing of the motion of the appellee to limit the scope of the appeal, the appellant filed the affidavit of J. O. Curtis.

The appellee recognizes that it is not the desire or wish of this court to have questions of fact relating to value referred to it for determination, and that this practice is discouraged. Had any opportunity been afforded to the appellee, he would have submitted his proof and had a finding made by the Supreme Court of New Mexico, but as no opportunity was afforded he was compelled to resort to this method of raising the question. In following this course, the appellee is guided by the practice as announced in the following cases.

Wilson vs. Blair, 119 U. S. 387;
Street vs. Ferry, 119 U. S. 385;
Gibson vs. Suchfeldt, 122 U. S. 31;
Red River C. Co. vs. Needham, 137 U. S. 633.

As to the affidavit of appellant filed in the lower court, in order to secure the appeal, we call attention to the fact by our motion that the same is upon information and belief and does not show grounds of such belief; is indefinite and uncertain, and the witness does not show himself qualified and no foundation is laid for his testimony as to the value of such property.

We do not understand that affidavits upon information and belief have any weight as evidence except in cases where by statute such affidavits are permitted.

The affidavit of J. O. Curtis admits that the intrinsic value of the said tract of land in controversy does not exceed the value of $1500 or $2000, but attempts to enhance its value on account of the peculiar situation of the land with reference to other lands, by decreasing the value of other lands, none of which are shown to be controlled or owned by the appellant.

In contradiction of these affidavits, is the affidavit of the assessor of the county wherein the land is situated and of eight other disinterested persons thoroughly familiar with the land. The affidavit of

the assessor shows that the land had only been returned for taxation for $300 to $460.

The burden of proof, as established by this court, being upon the appellant, we take it that there can be no serious question, that not only has the appellant failed to prove by a preponderance of the testimony that the land is worth $5000, but that the testimony predominates in favor of the appellee, that the land is not worth to exceed $1500; therefore we take it that the motion will be sustained and that the appeal will be confined to the only question which can be raised, independently of the amount involved, to the first assignment of error of the appellant.

Act of Congress of March 3, 1885, 23 Stat. 43.

TAX STATUTES.

The Statutes of New Mexico in force which we believe pertinent for the examination of the present case, are as follows:

Chapter 22, Laws of 1899, Secs. 19, 20, 22, 23, 25, 31 and 34:

Section 19—

"Taxes levied and assessed against real estate shall be a lien thereon from the first day of March of the year for which such tax may be levied. Taxes assessed against and levied upon personal property for any year shall be a lien thereon from the first

day of March of the year for which the same are assessed, until the taxes thereon have been fully paid and shall be payable in the county in which said property was situated on said day, except as hereinafter otherwise provided; and in all cases taxes assessed and levied against real or personal property shall be deemed a personal obligation of the person in whose name the property was assessed and personal judgment shall be rendered against him therefor."

Section 20—

"In entering up judgment in all such cases, the clerk shall add to the amount of tax, penalties and costs, as shown by such delinquent tax list, five per centum of the amount due from each person, or upon each lot or parcel of property described, which five per centum shall be the costs of such proceedings, and when collected shall be paid over to the treasurer of said county for the credit of the court fund."

Section 22—

"The collector in person, or by deputy, shall attend at the court house in his county on the day specified in notice of sale of property for taxes, and shall, between the hours of ten o'clock in the forenoon, and four in the afternon, offer for sale, separately and in consecutive order, each parcel of property included in the list attached to the order of sale, or so much thereof as may be necessary to realize the respective amounts due. The sale shall be continued from day to day until all the property described in the order of sale shall be sold, or until the amounts due shall be paid or realized:

Provided, The same must be completed within sixty

days after the commencement thereof, and the collector shall return the said order of sale, with a statement of his acts and doings endorsed thereon to the clerk of the district court, who shall file the same in his office. The collector shall be entitled to the same commission upon the money so realized as upon tax collections except that he shall turn over to the court fund the whole of the five per cent mentioned in section 20 of this act, as the costs of suit.

In case any property ordered to be sold be in too large a tract or tracts to be conveniently sold, the said collector shall offer the smallest tract in acres for which any one shall bid the amount of the tax and penalty, such tract to be as nearly as may be a square body beginning at the northeast corner of the whole tract. In case the property sold shall realize more than enough to pay the amount due, the surplus shall be paid over by such collector to the owner of such property. Each lot or parcel of property offered for sale shall be struck off to the best (highest) bidder for cash, but if there should be no purchaser in good faith for the same on the first day the property is offered for sale, when the property is thereafter offered for sale, and there is no purchaser in good faith bidding upon the same, the whole amount of the property assessed shall be struck off to the county as the purchaser, and the duplicate certificate delivered to the county treasurer and filed by him in his office, after having the same recorded in the office of the probate clerk of said county. No charge shall be made for issuing duplicate certificate or for filing and recording the same when the county is the purchaser. And the collector shall make an entry 'sold to the county' on the tax roll opposite the tax and shall be credited with the amount thereon in his settlement."

Section 23—

"If a purchaser does not pay the amount of his bid before ten o'clock of the day succeeding the sale, the property shall be re-offered for sale and the bid of any person so refusing to make any such payment shall not be received on the re-sale of said property. After receiving the amount for which any real estate shall be sold, the collector shall execute and deliver to the purchaser thereof a certificate of sale containing a description of the property sold and stating the name of the person or persons against whom the same was assessed, or that the same was assessed against unknown owners, as the case may be, the amount paid therefor, that it was sold for taxes, the amount and for the year or years for which the taxes were assessed, the amount of interest, penalties and costs, the date of sale, and the consideration or amount so paid therefor at such sale, that the collector by virtue of the authority vested in him by law, has sold and does convey said real estate to said purchaser, his heirs and assigns, subject to the right of the former owner to redeem the same within three years from date of sale by paying to the purchaser, his heirs or assigns, the amount paid therefor, at such sale with interest thereon at the rate of one and a half per cent per month from date of sale. Such certificate must be recorded in the office of the probate clerk of such county, in a book to be kept for the purpose of recording such certificates, and when so recorded, shall vest in the purchaser, his heirs or assigns, a complete legal title to the real estate described therein, subject, however, to redemption as herein provided, and such property, shall thereafter, unless redeemed, be assessed in the name of the purchaser, or his assigns, but the former owner shall have the right to redeem the same at any time within three years from the date of sale by paying to the collector then in office for the use of the purchaser, the amount of purchase money

with interest at the rate of one and a half per cent per month from date of sale, together with any taxes that may have been paid upon such real estate by the purchaser and assignees with interest thereon at the same rate; and such former owner may retain possession of said real estate until redeemed or until the time of redemption has expired.

The collector shall keep a book of sale containing the date of sale, description of the property sold, name of purchaser and amount for which sold. Upon the redemption of any property sold, as herein provided, the collector shall enter the fact of such redemption upon his book of sales, and shall issue to the person redeeming a certificate of redemption describing the property, and giving date of redemption and amount paid, upon the production of such certificate of redemption, the probate clerk shall mark the word 'redeemed,' with the date of redemption, and by whom redeemed, on the margin of the page where the record of such certificate of sale is made, and from the date of such redemption when so made and noted, the certificate of sale shall be deemed cancelled and annulled.

Any final judgment for the sale of such real estate for delinquent taxes rendered in accordance with the provisions of this act, shall estop all parties from raising any objection thereto, or to a tax title based thereon which existed at or before the rendition of such judgment or decree, and could have been presented as a defense in such action in a court wherein the same was rendered, and as to all such questions the judgment shall be conclusive evidence of its regularity and validity in all collateral proceedings; except in cases where the taxes had been paid, or the real estate was not liable to the tax or assessment. Counties purchasing at tax sales shall be deemed purchasers within the meaning of this act."

Section 25—

"It is hereby made the duty of every person, firm or corporation, owning or having any interest, legal or equitable, in any real estate or other property in this territory, on the first day of March of any year, to see that such property is properly listed for taxation on the assessment roll for such year in the county in which the same is situated; and if such property is described in the assessment roll and delinquent tax list for any year by such description as will serve to identify the same, *the sale of such property for taxes as provided in this act shall not be void or set aside on account of any error or irregularity in listing the same upon such roll or list, either as to the name or the names of the owner or owners thereof, or by reason of its being listed in the name of the wrong person; and no bill of review or other action attacking the title to any property sold at tax sale in accordance with this act shall be entertained by any court nor shall such sale or title be invalidated by any proceedings except upon the ground that the taxes, penalties, interest and costs had been paid before the sale, or that the property was not subject to taxation. In case any tract or legal subdivision of real estate be sold as hereinbefore provided upon a part of which the taxes had been paid, such sale and certificate shall nevertheless vest a complete and perfect title in the purchaser and his assigns to such portion of said tract or subdivision upon which the taxes had not been paid.*"

Section 31—

"In all cases where the delinquent taxes due amount to less than $25 it shall not be necessary for a collector to include in the publication hereinbefore provided the notice for application to the district clerk for judgment, but it shall be the duty of the said collector upon

such taxes becoming delinquent on the second day of January of each year, to advertise the property on which taxes are levied in some newspaper of general circulation as hereinbefore provided to be sold on the first Monday of May thereafter in the manner hereinbefore provided, and upon all taxes becoming due and delinquent on the second day of July of each year, the property upon which tax is levied shall be advertised to be sold in the same manner on the first Monday of November thereafter. *The collector shall issue to any purchaser under the provisions of this section a certificate of sale in the same manner as hereinbefore provided for the issuance of certificate, and the said certificate shall have the same force and effect as certificates issued in sales on judgments or executions hereunder. The collector may continue the sale of property hereunder from day to day not to exceed sixty days, until all of said property has been disposed of. But this section shall not relieve the collector of the duty of collecting the taxes by distraint and sale of personal property as provided in Secs. 4062, 4063, 4064 and 4065 of the Compiled Laws of 1897.*"

Section 34—

"All acts or parts of acts in conflict herewith either general or special are hereby repealed, and this act shall take effect and be in force from and after its passage: Provided, That the provisions of this act shall not affect or be applicable to taxes heretofore assessed, or which are delinquent at the date of the approval hereof, except that suit for the same may be brought and judgments thereon rendered in the manner provided by this act, but the validity of such delinquent taxes shall be determined by the law in force at the time of making the assessment therefor. The time for the payment of all taxes now delinquent is hereby extended until May 1, 1899, and when the same may be in litigation at the

date of the passage of this act until such litigation shall be determined."

The statutes relating to the rights of parties to appear before the boards and have their taxes adjusted, are set forth in the Compiled Laws of New Mexico, 1897, and are as follows:

Section 4047—

"Any person dissatisfied with the action of the assessor in respect to any assessment, may appeal to the board of commissioners."

Section 4048—

"The county commissioners of each county shall constitute a board of equalization for the revision, correction and completion of the assessment rolls. Such board shall hold two regular meetings for this purpose, in each year, at the court house, commencing on the first Monday of June and July. It shall, at its first meeting, have power to supply omissions in the assessment roll, and for the purpose of equalizing the same, may increase, diminish or otherwise alter and correct any assessment or valuation except where such valuation is fixed by law. In case any material changes are made by the board in the assessment of any person, company or corporation, the clerk shall immediately notify such person, company or corporation, by mail or otherwise, of the fact and the nature of the change. At either of said meetings, said board shall hear appeals and complaints of those dissatisfied with the assessment by the assessor, and shall decide the same as in their judgment is proper and right. Any person, company or corpora-

tion dissatisfied with the decision of said board, may appeal therefrom to the territorial board of equalization as constituted by and under Section 2634, by filing a written notice of appeal in the office of the clerk of said county board of equalization, within five days after the rendering of the decision of said board, which said notice of appeal shall state, in plain and concise language, the grounds upon which said appeal is made. The said clerk shall, within two days after the filing of said notice of appeal, and upon the payment by appellant to said clerk of one dollar, as an official fee for his services, certify in writing to the said territorial board of equalization all proceedings had before said county board, in the matter of said assessment so appealed from as well as said notice of appeal. The said territorial board of equalization, who are hereby invested with full power to act in the premises, either in increasing, diminishing, exempting or otherwise altering and correcting any assessment or valuation so appealed from, except valuations fixed by law shall, on or before the second Monday of August in each year and at such time and place as they may designate, hear and determine said appeal and decide the same, as in their judgment may be right and proper, and the decision of said territorial board of equalization shall be conclusive and final."

Section 4047 provides for the adding as costs to each tract of land sold (other than town lots) thirty-five cents for each tract.

BRIEF AND ARGUMENT.

TREATING OF THE FIRST ASSIGNMENT OF ERROR.

Appellants are contending that Chapter 22, of the Laws of 1899, wherein it gives force and effect to certificates of sale made for taxes, as against all questions other than:

(a) That the land was not subject to taxation;

(b) That the taxes had been paid;

(c) That the land had been redeemed;

is a denial of the due process of the law.

We contend that it is not. The law provides and makes it the duty of every person owning or having any property, on the first day of March of each year, to see that his property is properly listed, and in case of his failure, it becomes the duty of the assessor to list the property; and thereupon it becomes a lien.

Sec. 25, Laws of 1899.

The tax payer has statutory notice that on the first Monday in June of each year, the county commissioners sit as a board of equalization, and any person aggrieved

can appear before the board and if dissatisfied with their findings, appeal to the territorial board of equalization.

Secs. 4047-4048, Compiled Laws of 1897.

It becomes the duty of every tax payer to pay his taxes before becoming delinquent. In case of his failure, he is charged with statutory notice that the same will be sold for taxes, together with penalties and costs thereon. He is also charged with statutory notice that even if there be irregularities in the manner of making the sale, that nevertheless he cannot attack the certificate upon the grounds of irregularity, except for the things permitted by the statute.

Secs. 23-25-31, Laws of 1899.

The property in this case had been regularly assessed. Jurisdiction attached, and this was all that was necessary in order to constitute "due process of law." After his property was sold, he had three years in which to redeem.

It was not even necessary in order to constitute due process of law, to have had any sale whatsoever. The State could, if it saw fit, have forfeited the property to the State immediately upon his failure to pay the taxes.

King vs. Mullens, 171 U. S. 404;
King vs. West Virginia, 216 U. S. 92;
Fay vs. Cozer, 217 U. S. 456.

The construction of the statute of the steps required by law, are for the state courts; provided they do not encroach upon constitutional provisions.

"Whether all of the steps required by law were actually taken in a particular case, and whether the failure to take such steps would invalidate the sale, would seem to be a matter for the state courts rather than this court to decide, and it would appear that the Fourteenth Amendment would be satisfied by showing that the usual course prescribed by the state law required notice to the tax payer and was in conformity with natural justice."

Turpin vs. Lemon, 187 U. S. 51-57.

That the statutes of New Mexico require notice to the tax payer of the sale of his land for delinquent taxes is not questioned. That it is wholly within the discretion of the Legislature to prescribe the kind of notice and the manner in which the notice shall be given is also admitted. The Legislature of New Mexico might have provided that one publication of delinquent tax list shall be sufficient and no question could be raised as to its competency to do so. What the Legislature did provide was that the list shall be published four consecutive times weekly, not less than thirty days prior to the time of sale, to be mentioned in the notice appended. But that was not the only provision of the statute. The tax payer was also notified by the statute that the tax collector would be required to make the collection in the manner stated in the statute, but if

the collector committed any error in the publication, or negligently failed to comply with the law as to the number of times the list was published, such attempted publication would constitute notice to the tax payer. The tax payer was apprised in advance that he could not rely upon a strict compliance with the law by the very act which fixed his rights.

"The owner of property is bound to take notice of the time and place provided for tax proceedings. He knows that his property is subject to tax."

Ontario Ry. Co. vs. Yordy, 212 U. S. 152-157.

The law is the highest form of notice. The tax payer can rely only upon the protection the law offords him. If the law does not provide that neglect, ignorance or incompetency of the officer charged with its enforcement, shall constitute a defense to one who owes just and legal taxes, then such negligent act shall not be a defense unless they amount to a fraud upon the tax payer, or unless the failure to comply with the law was so gross as to justify a finding that the attempted sale was "not in accordance with the act," and was wholly without authority and void.

"It is not the province of this court to interfere with the policy of the revenue laws of the states nor with the interpretation given to them by the courts."

Castillo vs. McConico, 168 U. S. 684.

"But even if parole or other evidence were competent to impeach this sale, none such was offered, and it may well be doubted whether due process of law within the meaning of the Fourteenth Amendment requires a punctilious conformity with the statutory proceedings accompanying the sale. Whether all of the steps required by law were actually taken in the particular case, and whether the failure to take such steps would invalidate the sale, would seem to be a matter for the state courts rather than for this court to decide, and it would appear that the Fourteenth Amendment would be satisfied by showing that the usual course prescribed by state laws required notice to the tax payer and was in conformity with natural justice. Exactly what due process of law requires in the assessment and collection of general taxes has never yet been decided by this court, although we have had frequent occasion to hold that in proceedings for the condemnation of land under the laws of eminent domain or for the imposition of special taxes for local improvements, notice to the owner at some stage of the proceedings, as well as the opportunity to defend is essential."

Spencer vs. Merchant, 125 U. S. 345;
Huling vs. Kaw Valley Ry., 130 U. S. 559;
Hager vs. Reclamation District, 111 U. S. 710;
Paulsen vs. Portland, 149 U. S. 30.

"But the laws for the assessment and collection of general taxes stand upon a somewhat different footing and are construed with the utmost liberality, sometimes even to the extent of holding that no notice is required."

Turpin vs. Lemon, 187 U. S. 51.

We take it as settled by the decisions of this court that if this case is only appealable under Sec. 2 of the

Act of March 3, 1885, no question as to the construction of the statute will be considered, but only whether the statute as construed by the Supreme Court of New Mexico was within the power of the Legislature to pass "in view of the requirements of the Constitution of the United States."

McLean vs. Rio Grande Ry. Co., 203 U. S. 38-48.

The court will not consider as has been suggested, what are the "essentials under the territorial statute."

"The vice which underlies the entire argument of the plaintiff in error arises from a failure to distinguish between the essentials of due process of law under the 14th Amendment, and matters which may or may not be essential under the terms of a state assessing or taxing law. The two are neither correlative or coterminous. The first, due process of law, must be found in the state statute and cannot be departed from without violating the Constitution of the United States. The other depends on the law making power of the state, and as it is solely the result of such authority, may vary or change as the legislative will of the state sees fit to ordain. It follows that, to determine the existence of the one, due process of law is the final province of this court, whilst the ascertainment of the other, that is, what is merely essential under the state statute is a state question within the final jurisdiction of courts of last resort of the several states. When, then, a state court decides that a particular formality was or was not essential under the state statute, such decision presents no federal question, providing always the statute as thus construed does not violate the Constitution

of the United States by depriving of property without due process of law. This paramount requirement being fulfilled, as to other matters, the state interpretation of its own law is controlling and decisive. This distinction is pointed out by the decisions of this court. *Pittsburg, Cincinnati, etc., Ry. vs. Backus*, 154 U. S. 421; Kentucky Railroad Tax cases, 115 U. S. 321; *Davidson vs. New Orleans*, 96 U. S. 97."

Castillo vs. McConnico, 168 U. S. 674-683;
Ontario L. Co. vs. Wilfong, 223 U. S. 543.

The Supreme Court of New Mexico held that a sale of real estate for delinquent taxes was not invalid because of the following defects or irregularities in the proceedings leading up to the sale:

(a) Such sale was not sufficiently advertised for four consecutive weeks prior to the return date of such sale.

(b) That the printer who published the delinquent tax list upon which such sale was based, did not immediately after the last publication thereof, transmit to the collector of the said County of Quay, an affidavit of proof of such publication by any person to whom the fact of such publication was known substantially in the form prescribed by statute, or any other form.

(c) That the collector of said County of Quay did not make, nor cause to be made, an affidavit of posting such delinquent tax sale or notice as required by statute, and did not cause an affidavit of the publisher of such list or the affidavit of posting such list to be deposited with the probate clerk of said county.

(d) That the probate clerk of said county did not carefully preserve such affidavits or any affidavits of proof of such publication and posting such list as required by statute.

(e) That at the alleged sale aforementioned, it was attempted to sell said land for taxes alleged to be delinquent for the year 1904; that the sum alleged to be due against said land for taxes for the year 1904, and for which said land was attempted to be sold was $4.02, whereas the sum levied and assessed against the said land was in fact but $3.78 (Tr. p. 3).

The court held in effect that these admitted defects were not jurisdictional, but were mere irregularities, which the appellant was prohibited by the statute from taking advantage of.

Strauss vs. Foxworth, 16 N. M. 442-451.

"The plaintiff has no interest to assert that the statute is unconstitutional because it might be construed so as to cause it to violate the Constitution. His right is limited solely to the inquiry whether in the case which he presents the effect of applying the statute is to deprive him of his property without due process of law."

Castillo vs. McConnico, 168 U. S. 674-680.

The language of the lower court on this point is as follows:

"It is not claimed by the appellee that such a statutory limitation would stand against fraud or lack of jurisdiction, but they do assert that the irregularities

set up in the complaint do not go to the jurisdiction, and there is no claim of fraud made. The irregularities alleged are plainly distinguishable from such as would defeat jurisdiction, as, for instance, that there was no tax laid or attempted to be laid, on the land in question."

Strauss vs. Foxworth, 16 N. M. 442-450.

"The mode in which the property shall be appraised, by whom its appraisement shall be made, the time within which it shall be done, what certificate of their action shall be furnished, and when parties shall be heard for the correction of errors, are matters resting in its discretion. *Where directions upon the subject might originally have been dispensed with, or executed at another time, irregularities arising from neglect to follow them may be remedied by the legislature, unless its action in this respect is restrained by constitutional provisions, prohibiting retrospective legislation.* It is only necessary, therefore, in any case, to consider whether the assessment could have been ordered originally without requiring the proceedings, the omission or defective performance of which is complained of, or without requiring them within the time designated. If they were not essential to any valid assessment, and therefore might have been omitted or performed at another time, their omission or defective performance may be cured by the same authority which directed them, provided always, that intervening rights are not impaired."

Williams vs. Supervisors of Albany, 122 U. S. 154-164.

Cited in *Castillo vs. McConnico*, 168 U. S. 674-682.

The appellants have cited the case of *Marx vs. Hanthorn*, 148 U. S. 184, as the controlling authority of the Supreme Court of the United States, that notice of sale was an essential part of the proceedings, and that the legislature did not have the power to make the tax deed conclusive evidence of the fact. In this we are compelled to disagree. A reading of that case will clearly show that the question was not before them *for a construction*, but was before them *charged with construction*, placed upon it by the state from which it was appealed. It was an appeal from Oregon and the Supreme Court of that state had construed their statute as to the effect of the defective name in the assessment of the property, and the Supreme Court of the United States simply followed the construction placed by the state courts, as they do in all questions which are not federal in their nature. As stated before, a mere reading of this case would show this to be the fact, but if there was any doubt, a later case decided by the Supreme Court of the United States shows in words of that court that this was exactly what they had decided and why they had decided it in that manner.

In the case of *Castillo vs. McConnico*, 168 U. S. 684, the court uses the following language:

"The authorities referred to tending to establish that where the law requires an assessment to contain the name, the omission of the name renders the assessment void, are inopposite to the question under consideration. We are not here concerned with the meaning of

the Louisiana statutes, or whether we would hold as an original proposition, were we construing them, that a defect in the name of the person assessed would not be a material variance. The Supreme Court of the State of Louisiana has construed the statutes of that state otherwise. The issue which we are to determine is not what interpretation should be given to the statutes of the State of Louisiana, but whether accepting the meaning affixed to the statutes of that state by the court of last resort of the state, their provisions as so interpreted are repugnant to the Constitution of the United States, because not affording due process of law. The previous adjudications of the Supreme Court of Louisiana referred to by that court in its opinion, and upon which it rested its decree, in this case, in effect hold that under the Louisiana law a mistake in the name did not render the assessment void, and therefore, that the conclusive presumption engendered by the Louisiana Act of 1884 was not intended to, and did not make valid a wholly void assessment. Because in a case decided subsequently to the one now under review the Supreme Court of the State of Louisiana has held that an assessment in the name of a person deceased rendered such assessment wholly void, it does not follow that the court thereby departed from the ruling which it had made in this case, and which had been by it rested upon a line of decisions declared by it to have conclusively settled the law of Louisiana on the subject, and which in effect, it announced had become a rule of property in that state. *The case of Marx vs. Hanthorn*, 148 *U. S.* 172, *in no way conflicts with the foregoing considerations. That case came to this court on appeal from a circuit court of the United States and its decision involved ascertaining the meaning of the tax laws of the state as interpreted by the court of last resort thereof. In performing this duty, the court adopted and followed the construction given to the tax laws of the state by the Supreme Court of the state whence the case came.*

This case practically disposes of the question that a statute, of the character of our statute, is not a denial of "due process of law." In that case there was a defect in the advertisement of the sale. The statute of Louisiana at that time made the deed conclusive of the efficiency of the assessment of the property sold under it, the Supreme Court of the State of Louisiana held the deed conclusive, and the Supreme Court of the United States sustained the decision of the Supreme Court of Louisiana, and distinctly held that although the statutes of Louisiana provided for a listing of the real name of the owner, that the assessing of the property to unknown persons or improperly listing the name, was not a denial of "due process of law." This case is also particularly instructive as to what can be dispensed with, and it calls attention to the fact that the State of Louisiana could have directed that the property subject to its taxing authorities could be assessed without reference whatever to the name of the owner, that is to say, by any such description and method as would have been legally adequate to convey actual or constructive notice to the owners, and cites the case of *Witherspoon vs. Duncan*, 4 Wallace 210, and cites with approval the following from the said case:

"It was not the province of this court to interfere with the policy of the revenue laws of the states nor with the interpretation given them by their courts. Arkansas has a right to determine the manner of levying and collecting taxes, and can declare that a particular

tract of land shall be chargeable with the taxes, no matter who is the owner, or in whose name it is assessed and advertised and *that an erroneous assessment does not vitiate a sale for taxes.*"

Appellants also contend that a federal case, *Bannon vs. Burns*, 39 Fed. 895, decided in a circuit court of the Western District of Missouri, by Judge Phillips, since the decision of the De Treville and other United States cases, has held a contrary view from that expressed by the Supreme Court of the United States. Even if this were true, it would be rather a novel contention that a circuit judge would overrule the Supreme Court of the United States, and that this court should follow the decision of the circuit court rather than the rulings of the Supreme Court. It is true that in that case the circuit judge discusses some propositions which would seem to be contrary to the holding of the Supreme Court, but the case itself was decided upon an entirely different principle. It seems that a certain tract of land had been deeded to the United States, and an act of the legislature in the State of Missouri was passed, giving the consent of the state to the purchase by the United States, and exonerating the land from all taxes, assessment and other charges, and it was upon this grant, consent and exoneration by the State of Missouri, that the case turned. However, the judge in that case recognized the doctrine of the De Treville case, but held that it did not estop the in-

quiry as to whether the property at the time of the sale was subject to a summary process for taxes, and uses the following language:

"It is not apparent that there is anything in the points ruled in *De Treville vs. Smalls*, 98 U. S. 517, in conflict with what is held here, for neither the statute there construed, nor those of the states cited, extended to or undertook to assert the position that the deed itself should conclude all inquiry as to whether the property at the time of the sale was subject to the summary process for taxes. In other words, the statute did not declare an *ex parte* deed valid where there was a lack of power to sell in the mode pursued. For, as said by the court in the De Treville case: It (the deed) may be regular in form and in the mode of its conduct, but it cannot be valid unless authorized by law. *Vide Marsh vs. Fulton Co.*, 10 Wall. 683, 684; *Railroad Co. vs. Parks*, 32 Ark. 131; *Radcliffe vs. Scruggs*, 46 Ark. 96.

If, however, our conclusion as to the validity of the tax deed be tenable, there is another obstacle in the way of plaintiff's recovery, which we think is unsurmountable."

The case of the *Central Railway Company vs. Georgia*, 207 U. S. 127, was an attempt by the State of Georgia to deprive the tax payer, who failed to return his property, of any opportunity to be heard as to the value of the property, or the amount of the assessment, and made the return of the collector conclusive upon the tax payer.

A perusal of the opinion delivered in this case leaves no doubt in our mind that the Supreme Court

judgment has held the tax scheme of the State of Georgia as laid down in its statutes to be that while it provides for a method of valuation in cases of the return of property for taxation, it does not intend to give to the tax payer who fails to return property legally liable to be assessed any opportunity to be heard as to the value of the property or the amount of the assessment, but the failure to return places it within the power and duty of the collector to make the assessment final and conclusive upon the tax payer without hearing.

Nothing of this kind is contemplated or permitted by the statutes of New Mexico. Whether a tax payer made his return or whether it was made by the assessor, he has equal facilities for contesting as to the value of the property or the amount of the assessment, or the legality of the levy. A mere reading of the statutes of New Mexico show this to be a fact, and no contention has been made in this case questioning the legality of the levy, but the sole argument has been directed as to the method of sale and failure to strictly pursue the letter of the statute, insisting that failure to do so would vitiate the deed, and that any technicality therein would be grounds for setting it aside. The appellant has failed to distinguish between the jurisdictional facts, viz.: assessment and levy; and the method or procedure of sale.

We appreciate that this court is thoroughly familiar

with its own decisions and that it has so often distinguished and passed upon matters of this character, that to our minds it has become fundamental. Therefore, we have not attempted to go beyond the decisions of this court by citing various decisions of the several states, which have treated this subject in some instances with regard to the 14th Amendment, but in most instances with reference to their own constitution. Therefore, we shall content ourselves with the decisions of this court.

If the Supreme Court sustains the motion to restrict this case to the federal question, it leaves no other matter for discussion, for if it holds that the statutes to which we have called attention constitute "due process of law," then we take it that this court is not concerned in the construction which has been placed upon the statute by the state court. However, in order that the court may be fully advised as to our position upon the other questions, we will attempt to set them out, following as near as possible, the order of the Assignment of Errors.

TREATING OF APPELLANT'S SECOND ASSIGNMENT OF ERRORS.

By appellant's second assignment of error, this court is asked to review a question which was neither raised in the trial court nor the Supreme Court of New Mexico, and therefore not decided by either court. No

doubt under his pleadings, the appellant might have shown any one of numerous reasons why he should have had equitable relief. But there is no doubt that this action was brought to cancel the tax deed, and the specific grounds alleged in plaintiff's complaint were treated throughout all the proceedings as his entire right of cause of action. We deem it unnecessary to argue as plain a proposition that this court will not entertain questions which were not presented in the court below.

Montana Ry. Co. vs. Warren, 137 U. S. 348-351.

If the appellant had relied upon his general allegation, his complaint would not have been demurrable, but instead, he made his case on his exceptions to appellee's tax title, and we think thereby pinned his cause of action to the sole question of the validity of that one, nor can we think that if this point had been raised either of the lower courts would have failed to have ruled correctly upon it. The case is so plainly one brought to test the appellee's tax title, and the lower courts have so evidently considered it in that light alone, that we do not believe in fairness and justice appellant will be permitted to take advantage of a right that he has up to this time seemed very willing to waive.

TREATING OF APPELLANT'S THIRD ASSIGNMENT OF ERRORS.

The statute of 1899 was passed by the legislature in order to correct an evil. Prior to its passage, the slightest irregularity or defect in the assessment, tax description of the property or notice of sale would render invalid the tax deed.

Blackwell vs. Bank of Commerce, 10 N. M. 561;
Territory vs. Perea, 62 Pac. 1094.

Tax titles were so lightly regarded that little, if any, attention was paid to them, as they could be so easily set aside. The legislature of New Mexico recognizing, as has been said by the Supreme Court of the United States, in the case of

Springer vs. United States, 102 U. S. 586;

"The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of the government. The idea that every tax payer is entitled to the delay of litigation is unreasonable. If the law herein given involved any wrong or unnecessary harshness, it was for Congress or the people who make Congresses, to see that the evil was corrected. The remedy does not lie with the judicial branch of the government."

Therefore, they determined to enact an effective statute, not in any particular retroactive, but to apply

to taxes to be levied in the future, and not affecting or attempting to affect taxes which were then laid, but simply to provide an effective method by which taxes might from thenceforth be collected. They do not encroach or attempt to encroach upon jurisdictional facts, to provide in future that technical defects in the manner of making sales should not render the sale void, except upon one of the essentials.

Proceeding to the consideration of the principal features of the statute, we desire to call attention as to the requirements set forth in the complaint of appellant:

(a) "Such sale was not sufficiently advertised for four consecutive weeks prior to the return day of the sale."

Attention is called to the fact that this allegation is not tantamount to an allegation of no publication at all. True, the statute requires that "the said delinquent tax list and notice shall be published not less than once each week for a period of four consecutive weeks, the last publication to be not less than 30 days prior to the return day named in said notice." The insufficiency complained of is not specified, and it might have been that the last publication was less than 30 days before the return day named in the notice, or there might have been four publications but not consecutive, or less than four publications. But in reading the alle-

gation given, the construction most favorable to the pleader amounts to this: *That there was a publication* but not a sufficient one; *an irregular publication*, but nevertheless an attempted publication. This view was taken by the lower court, because they say (p. 451 of the Opinion):

"The irregularities alleged are plainly distinguishable from such as would defeat jurisdiction, as, for instance, that there was no tax laid or attempted to be laid on the land in question."

Under the case presented to the lower court, it was not decided that there was no notice, but on the contrary, it was decided that the notice, though irregular, was cured by the statute. Any other position would have nullified the provisions of the statute which sustained the tax deed.

It was strenuously urged upon the court below that the words, "in accordance with this act," as found in that part of Section 25, which reads: "and no bill of review or other action attacking the title to any property sold at tax sales, in accordance with this act, shall be entertained by any court, nor shall any such sale or title be invalidated by any proceeding except upon the ground that the taxes, penalties, interest and costs had been paid before the sale, or that the property was not subject to taxation" meant a strict compliance with the provision of the act. Upon this point, the court said:

"It is not claimed that even if the limitations on attack found in Section 25 is not restricted to cases of error in listing, yet, by the words, 'sold at tax sale in accordance with this act,' it was meant to limit that restriction to those cases in which the provisions for advertisement and sale contained in the act should be strictly followed. We are satisfied, however, that it was meant by this provision to afford deliverance from the evils of having tax sales held invalid for irregularities, which were not based on meritorious grounds, an evil, which as a matter of common knowledge, not only in New Mexico, but throughout the country, as seriously to interfere with the fair adjustment of the burden of taxation. Bearing in mind the familiar rule of statutory construction which gives to the legislative intention controlling force, we are satisfied that the words, "in accordance with this act"—not, it should be noticed, as having perhaps some significance in accordance with the provisions of this act—mean no more than under and by authority of this act, and that the intention was merely to limit the effect of Section 25, to cases coming under Chapter 22, as distinguished from those to which the provisions of law left unrepealed might apply" (p. 449-450, Opinion).

This language is susceptible of no other construction than that the lower court decided that the notice though irregular was under the statute notice. Not that the statute was to be construed as curing absolute failure to comply with it, but that the statute did not require strict compliance with its provisions.

"Laws which undertake to provide that in future proceedings, errors, or irregularities shall not be fatal, come also under the same restrictions upon legislative

authority, they cannot for instance cure a total want of power to tax, nor can they relieve against jurisdictional defects. But such laws would seem entitled to liberal consideration, since the parties concerned would be apprised in advance that they were not to rely upon an exact compliance with the law, and would be under greater obligation to watch the proceedings."

Cooley on Taxation, 521-522.

It has been endeavored by the foregoing citations from the opinion of the lower court, to show that the Supreme Court of New Mexico has not decided that notice is not an essential under the statutes of New Mexico to give jurisdiction, nor that the particulars of this case considered that the appellant had no notice, but that he had such notice which the statute provided he should have, viz., notice in compliance with the statute, but not notice in exact or strict compliance with the statute. That the delinquent tax list was published is admitted, and if it was published less than four consecutive weeks or within 30 days of the day of sale, it was a sufficient compliance with the law and gave jurisdiction.

At page 8 of their brief, counsel for appellant say:

"Sec. 25 of Chapter 22 of the Laws of 1889 of New Mexico in effect, if given the effect contended for by the Supreme Court of New Mexico, permits the taking of property by the territory for taxation, without assessment, levy, notice or notice of sale, for the reason that after sale is made it cannot be attacked

except for the two grounds: First, that the tax has been paid, and second, that the property was not subject to taxation."

We respectfully insist that there is nothing in the opinion of the lower court that justifies the statement of counsel, much less is there anything in the case made upon which the judgment was rendered. That there may be other grounds as "substantial as that the land was not subject to the tax, that the tax had not been paid, or the land redeemed from sale in the manner provided by law, on account of which a tax sale may be invalidated" (p. 451, Opinion), is not decided or precluded by the decision of the lower court.

"The previous adjudication of the Supreme Court of Louisiana referred to by that court in its opinion and upon which it rested its decree in this case, in effect hold that a mistake in the name did not render the assessment void, and therefore, that the conclusive presumption engendered by the Louisiana Act of 1884 was not intended to, and did not make valid a wholly void assessment."

Castillo vs. McConnico, 168 U. S. 674-684.

It is the position of the appellee that the decision of the Supreme Court of New Mexico, in effect holds that the failure of the officer charged with the duty of publishing a delinquent tax list, to publish it for the entire time required by the statute, or on the date required by the statute, was not a failure to give notice, and that therefore the conclusive presumption engen-

dered by the New Mexico Act of 1899 was not intended to and did not supply a want of notice at all. The lower court held that there was no jurisdictional defect for the conclusive presumption to cure.

The exceptions b, c and d under the second assignment of errors all refer to the failure to make proof or affidavits of the publishing of the delinquent tax list, and the posting of such delinquent tax list and the failure to preserve such evidence of publication and posting.

"It may not be altogether easy in a particular case to determine whether the defects be jurisdictional or not, but certain irregularities in the personal conduct of the officers in making the sale would not be so regarded; and it is at least exceptionally doubtful whether the failure to preserve the auditor's list of delinquent lands or the evidence of publication and posting of the statutory notice would vitiate a deed made by the clerk after a lapse of 12 years."

Turpin vs. Lemon, 187 U. S. 51.

The lower court held that the defects above mentioned were mere irregularities and not jurisdictional. That the legislature might have dispensed with the acts of the making of the affidavit by the publisher of the delinquent tax list and of the affidavit of the posting of such list, and further the preservation by the probate clerk of such affidavit seems clear.

If this was an original question before this court, for a construction and not a statute which has already

been charged with a construction by the State of New Mexico, still we feel that the Supreme Court of the United States has made an original construction of a similar statute in the case of

DeTreville vs. Smalls, 98 U. S. 517.

It was an action brought by De Treville against Smalls to try the title to a certain lot of ground and after the plaintiff had made out his case, the defendant offered in evidence a tax sale certificate issued by two commissioners under the United States law. A number of objections were offered to the certificate which are unnecessary to discuss. The court overruled the objections and then the plaintiff, among other things, offered to prove a defective description of the property, defective assessment and defective advertisement, and the court said:

"The numerous decisions cited by the plaintiff in error to support his objection are quite inapplicable to the case. No doubt it has been decided that statutes which makes a tax sale deed *prima facie* evidence of the regularity of the sale, do not relieve a purchaser from the burden of showing that the proceedings anterior and necessary to the power to make the sale actually took place. Such a provision has been held to relate only to the conduct of the sale itself. But the Act of 1863 declares that the commissioners' certificate shall be *prima facie* evidence not merely of the *regularity* of the sale, but also of its *validity* and of the *title* of the purchaser; and it enacts that it shall only be affected as evidence of the regularity and validity of the sale

by establishing the fact *that the property was not subject to taxes*, or that the *taxes had been paid previously to the sale*, or that the *property had been redeemed*. How can a deed be *prima facie* evidence of the validity of a sale, unless it be such evidence of the transmission of the title of the property? Is any sale valid which does not pass title to the subject of the sale? It may be regular in form, and in the mode of its conduct, but it cannot be valid, unless authorized by law. Now, the act of Congress makes a certificate of sale by the commissioners evidence that the title acquired by the purchaser under the sale was a valid one, assailable only by proof of one or the other of three things. It is not the certificate of an assessment or of an advertisement of a sale, followed by an actual sale, to which such an effect is given, but a certificate of sale alone. We are not at liberty to interpolate in the statutes requisites for the certificate which the statute does not demand."

The court in this case, after discussing alleged defects as to the manner of making the assessment, then said:

"Besides all possible attack upon the *prima facie* of the certificate was limited by the express provisions of the act, which enacted, as before stated, that it should only be affected as evidence of the regularity and validity of sale, by establishing the fact *that the property was not subject to taxes*, or that the *taxes had been paid previous to sale*, or that the *property had been redeemed*. This left to the owner of lands subject to the tax *every substantial right*. It was his duty to pay the tax when it was due. His land was charged with it by the act of Congress, not by the commissioners; and the proceeding ending in a sale was simply a mode of

compelling the discharge of his duty. *All his substantial rights were assured to him by the permission to show that he owed no tax, that his land was not taxable, that he had paid what was due, or that he had redeemed his land after sale. He was thus permitted to assert everything of substance,—everything except mere irregularities.*

"We do not feel at liberty to disregard the plain intention of the acts of Congress. We are not unmindful of the numerous decisions of state courts which have construed away the plain maining of statutes providing for the collection of taxes, disregarding the spirit and often the letter of the enactments, until of late years the astuteness of judicial refinement has rendered almost inoperative all legislative provisions for the sale of land for taxes. The consequence was that bidders at tax sales, if obtained at all, were mere speculators. The chances were greatly against their obtaining a title. The least error in the conduct of the sale or in the proceedings preliminary thereto, was held to vitiate it, though the tax was clearly due and unpaid. Mr. Blackwell, in his Treatise on Tax Titles, says, 'that out of a thousand cases in court (of tax sales), not twenty have been sustained.' To meet this tendency of judicial refinement very many states have of late adopted very rigid legislation. The acts of Congress we are considering must have had it in view. Hence the stringent provisions they contain. They declare, in effect, that the certificate of the commissioners' sale shall be evidence of compliance with the preliminary requisites of the sale, and that this evidence shall be rebutted only by proof of one or the other of three specified things. *There is no possible excuse for not enforcing such statutes according to their letter and spirit.*"

The court then discusses a number of state statutes, similar in form.

The Supreme Court in the case of *Keely vs. Sanders*, 99 U. S. 441, again reaffirms all that was said in the case of *De Treville vs. Smalls*. In that case one of the objections was that the property was not advertised for sale legally and properly and in discussing this feature, among others, the court uses the following language:

"Thus far we have not considered the effect of the proviso to the seventh section of the Act of 1863. That should not be overlooked. After having declared that the commissioners' certificate should be *prima facie* evidence both of the regularity and validity of the sale, as well as of the title of the purchaser, Congress went further, and enacted that it should be affected as evidence of such regularity, validity, and title only by establishing one or more of three facts: non-liability of the property for taxes, or that the taxes had been paid before the sale or that the property had been redeemed. *Of what possible use was this proviso, unless it was intended to make the certificate conclusive of the validity of the sale and the title of the purchaser, unless it should be impeached by establishing one of the three facts mentioned?* If it meant only that proof of the existence of one of those facts should destroy the ***prima facie*** effect of the certificate, it was quite superfluous. Without it, if either of those facts existed, a sale would have been invalid and the certificate good for nothing, no matter how regularly the sale might have been conducted, or how fully and correctly it might have been advertised, or how accurate might have been the assessment. Congress must have had a purpose in the proviso, and what that was it is not difficult to discover. It was not to repeat what had been enacted

in the same section. The provisions of the whole act were designed to enforce the collection of direct taxes in insurrectionary districts, avowedly so. Governmental disturbance in such districts must have been anticipated, as well as only a partial restoration of the ordinary forms of governmental rule, while the districts were under military control, and consequent irregularities in the processes of collecting taxes. Substance, therefore, not form, was to be required. Hence the proviso. *It secured to land owners every substantial defense against sales for taxes, and made the sale certificate conclusive of everything else.* Such was our opinion expressed in *De Treville vs. Smalls*, and we adhere to it now."

In the case of *Sherry vs. McKinley*, 99 U. S. 497, wherein it was asserted that the assessment was excessive; that the sale was not advertised; that the property was not sold on the day advertised, and numerous other questions, the Supreme Court again reaffirms its former decision in *De Treville vs. Smalls* and *Keely vs. Sanders*, and the court uses the following language:

"The objection that the sales were not sufficiently advertised is met in the cases we have heretofore decided. * * * At most, there was but an irregularity which the Act of 1863 rendered ineffective to defeat the title of the purchaser."

Also in the latter case of *Springer vs. United States*, 102 U. S. 586, the court uses the following language:

"This court held that an act of Congress authoriz-

ing a warrant to issue, without oath, against a public debtor, for the seizure of his property, was valid; that the warrant was conclusive evidence of the facts recited in it, and that the proceeding was 'due process of law' in that case."

The appellant is attempting to dispose of these U. S. cases by saying that they have not been followed by a large number of state courts, nor referred to by some text writers. Admittedly they have been followed by a number of states, and these decisions themselves were based upon the construction of similar statutes by states at the time they were rendered. Just what the prevailing weight of state authorities might be upon this question, we do not think it is pertinent to inquire into. They were expressions of the Supreme Court of the United States, nor have they ever been modified, and so far as we have been able to ascertain, they are the only decisions which were unaided and uninfluenced by state courts. True, the statutes grew out of the extraordinary condition. Had it not been so, we should not have had the decision of the highest court placing the primary construction upon the tax law, the extraordinary condition occasioned the law, but did not occasion the construction to be placed upon it. These cases were decided in 1878, long after the Civil War had closed. The law itself was not passed under the suspension of constitutional guaranties. The tax payers were within the protection of

that clause of the 5th Amendment of the Constitution which provides that:

"Nor shall any person * * * be deprived of * * * property without due process of law."

This same clause had the same binding effect that the same clause now the first section of the 14th Amendment of the Constitution has upon any state. Those cases had all of the irregularities and many in addition that are contended for in the present case, and still the court held that all of the substantial rights were retained to the tax payer by permitting him to show that; he owed no tax; that his land was not taxable; that he had paid what was due or had redeemed his land after sale.

TREATING OF APPELLANT'S FOURTH ASSIGNMENT OF ERROR.

The appellant is urging as error, the alleged discrepancy between the amount alleged to be due and for which the property was sold, and the same levied and assessed. They seem to have overlooked the fact that property is never sold for the amount levied and assessed against it; the penalties, costs and costs of publication are always added. The law provides expressly that thirty-five cents shall be added for the advertisement of each tract of land.

See Statute 4047, Compiled Laws of 1897;

Also a reading of the Revenue Laws provide for the adding of penalty and costs.

It was not charged in direct words or by intendment that the property was assessed for a certain amount and that the assessment was raised at the time of sale, but it is true that it was assessed for a certain amount, and a larger amount realized at the time of the sale. This is clearly the case whenever property is sold; and attaching to it the necessary presumption that the court recognizes the provision of the tax law, the discrepancy is explained. In other words, the demurrer admits that the property was assessed at $3.78; also admits it was sold for $4.02. Still, this does not make the amount for which it was sold invalid or excessive in amount in any particular, on account of the penalties, interests and costs of sale which are presumed to have been added. Therefore, it became the duty of the court upon the demurrer in the absence of any allegation of an unlawful or excessive amount to sustain the demurrer. The lower court disposes of these exceptions in the following language:

"Still further counsel for appellant contend that one of his reasons stated falls within one of the grounds of attack permitted by the statute (Chap. 22) and that as the tax levied was $3.78 and the sale was for $4.02, the land was not subject to the taxation for which the alleged sale was made. It is said in reply, that the difference between the two sums mentioned would be covered by the interest and expenses of sale which the law permits the county to add, and such, it seems clear,

must have been the case. In *Drennan vs. Beierlein*, 49 Mich. 274, Cooley, Judge, it was held, 'in the absence of a clear showing to the contrary, it will be presumed that the addition was lawfully made.'"

(Page 450 of the Opinion.)

This is not a holding that the statutes of New Mexico permit land to be sold for delinquent taxes for a greater sum than the tax levied against it, but is simply that the allegation was insufficient; the lower court's decision being upon a question of practice will not be reviewed in this court.

Sweeny vs. Loune, 27 Wall. 208-213;
Armijo vs. Armijo, 181 U. S. 558-561.

TREATING OF APPELLANT'S FIFTH ASSIGNMENT OF ERROR.

By referring to Sec. 31, of Chap. 22, of the Laws of 1899, it will be seen that sale made for delinquent taxes for less than $25.00, and certificates issued thereunder, shall have the same force and effect as certificates issued on judgments or executions. As to the validity of this statute, we feel that we have sufficiently discussed this matter with reference to the other provisions.

CONCLUSION.

The deduction which we draw from the decisions of the Supreme Court of the United States are:

(1) The legislature having provided for a lawful levy and assessment, due statutory notice for the making of the same, full opportunity having been given to the land owner, jurisdiction attaches; thereupon the state could proceed to collect the tax by forfeiture, sale or otherwise.

(2) That the substantial matters reserved to the tax payer are:

(a) the right to show that the land was not subject to taxation.

(b) that the tax had been paid.

(c) the right to redeem.

All other matters are non-essentials and failure to observe them can be provided by statute to be mere irregularities.

In the case at bar, it is admitted that the property was subject to taxation and was properly assessed. Thereupon, jurisdiction attached. Appellant failed to pay the tax, he failed to redeem, although he had three years in which to do so. He allowed some two years to expire after the period of redemption, and which was some five years from the date of sale, and six or seven years after the assessment and levy, and now for the first time, seeks to set it aside because of some *alleged irregularities*. He has not asserted an equity in his favor, but stands upon *alleged technical* rights. If this can be done, we submit every tax title which has been created since the passage of our tax statutes would

probably be subject to a similar objection, or at least to some other technical objection, so that the same could be set aside. Tax collections in the future would be rendered extremely difficult and the securing of purchasers almost impossible. We most earnestly contend that a careful consideration of all of the cases decided by the Supreme Court of the United States fully justify the conclusion that this should not be done and in the language of the Supreme Court of the United States "there is no possible excuse for not enforcing such statutes according to their letter and spirit."

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